# No. 6111

IN THE

# United States Circuit Court of Appeals

## For the Ninth Circuit

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BANK OF ITALY NATIONAL TRUST AND SAVINGS ASSOCIATION (a national banking association),

*Appellant,*

vs.

THE FARMERS AND MERCHANTS NATIONAL BANK OF MERCED (a national banking association), and HENRY P. HILLIARD, as Receiver thereof,

*Appellees.*

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## BRIEF FOR APPELLEES.

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## BRIEF FOR APPELLEES.

### INTRODUCTORY STATEMENT.

The introductory statement of the facts in appellant's opening brief is substantially correct. The statement however on page 5 of that brief that the court found that "the National Bank sold and converted said bonds of the Savings Bank and appropriated the proceeds thereof to its own use, and to the damage of the Savings Bank in the sum of $28,000" is not accurate. As to conversion the court found that the bank "sold and converted to its own use and benefit without the knowledge or consent of Merced Security Savings Bank or the City of Merced

the following described negotiable bonds, the then property of the Merced Security Savings Bank, to wit:" (Here follows description of the bonds.) (Trans. of Record, paragraph 6, p. 54.) This is not a finding that the appellees appropriated the *proceeds* of the bonds.

The only evidence in the record as to the transactions by which the appellees received and disbursed moneys in connection with the bond transaction is the testimony of W. C. Freeland beginning at page 80 of the transcript of record and ending at page 86 thereof, and continued again from page 87 to page 89 thereof. The following question was asked Mr. Freeland:

> "Q. From examination of those books and accounts I ask you whether or not the Farmers & Merchants Bank did receive or retain anything out of that transaction?
>
> A. It did not."
>
> (Trans. of Record, p. 81.)

It will be noted that there was an objection to the foregoing question only upon the ground that it is incompetent, irrelevant and immaterial, counsel stating in connection with the objection: "This is a matter of whether the Merced Security Savings Bank, the predecessor in interest of the plaintiff, sustained any loss by reason of this transaction rather than whether or not the party who was guilty of the conversion sustained a loss or received any benefit."

The evidence it would seem was clearly material, and there being no objection to the manner of making the proof, of course this court will consider the evi-

dence notwithstanding the objection and exception. The examination of Mr. Freeland following that question and answer demonstrates that the books of the bank were simply used by J. B. Hart, the treasurer of the City of Merced and at the same time manager of the bank, as a means of effecting his wrongful purpose, and not as a means of adding anything to the assets of the bank. The expression of the court in its written memoranda in connection with the decision of the case of course has no effect whatever upon the findings and judgment afterwards made and entered. The statement of counsel for appellant above quoted clearly defines appellant's contention with reference to the position of the appellee. That contention was that, even though appellee received no benefit from the transactions of its manager defendant appellee was responsible to appellant for any loss sustained by it. The contention of appellee was exactly the converse.

No finding of the court and nothing in the record supports the statement on page 5 of opposing counsel's brief that "The court further found that the sale and conversion of the bonds were not made in connection with the deposit of public funds in the Savings Bank and were not dependent upon or connected therewith in any way whatever." It clearly appears from the records of course that these transactions carried on by Mr. Hart, the city treasurer, and at the same time bank manager, were not necessary or proper in connection with the deposit in appellant bank, but those transactions are directly connected with and a part of Hart, treasurer, in connection with this city deposit in appellant bank.

## I.

### APPELLANT IS NOT ENTITLED TO REVIEW OF FINDINGS OF FACT.

It will be noted that appellant does not in its brief undertake to avail itself of any error in a ruling of the court made during the course of the trial. No motion or request for special findings was made by appellant at the conclusion of the trial or at any time. The appellee moved for judgment in his favor and against the plaintiff, and for special findings specifying the special matters requested to be found upon. (Trans. of Record, p. 31.)

Motion for judgment generally without any request or motion for special findings of fact was made by plaintiff and appellant. (Trans. of Record, p. 20.) Under this state of the record it seems that this court will not review any alleged errors except those in which rulings during the course of the trial were duly excepted to. Since appellant has not presented any matter of that class or discussed any alleged errors of the court during the course of the trial in its brief, it would seem that this court will not review the record. It is true that appellant quotes at length from the opinion of the trial court and rests its contention of error upon excerpts of that opinion. This court has said:

> "On the trial no exceptions were taken to any ruling of the court, and no request was made for special findings, or for a finding in favor of the defendant in the action. The plaintiff in error refers to the opinion of the court below as containing special findings of fact, but the opinion cannot be resorted to for that purpose.

> In the absence of a special finding, the judgment must be affirmed, unless the complaint fails to state a cause of action, or the bill of exceptions presents some erroneous ruling of the court in the progress of the trial. There being in the present case no ruling of the trial court, and no special finding of fact, but only a general finding, the latter must be accepted as conclusive, and this court can go no further than to affirm the judgment."
>
> *Northern Idaho & Montana Power Co. v. A. L. Jordan Lumber Co.,* 262 Fed. 765, 766;
>
> *China Press, Inc. v. Webb,* 7 Fed. (2d) 581, 582;
>
> *Wulfsohn et al. v. Russo-Asiatic Bank,* 11 Fed. (2d) 715.

Appellant in its brief has not attacked any finding made by the court. It has attacked conclusions of law which it based upon expressions of the trial court in his written opinion. Special findings were neither asked for nor made. The general finding therefore that the bonds were converted, and that they were of the value of $27,300, and that the plaintiff and appellant has been reimbursed in the sum of $20,547.02 is simply the general finding of the court and must be presumed by this court to be based upon the evidence in the case.

In connection with the payments made by the surety company the trial court found as follows (Trans. pp. 56, 57):

> "That subsequent to said September 20, 1926, and prior to February 1st, 1927, said Merced Security Savings Bank made proof to its claim

herein arising out of the facts alleged in said complaint for damages in the sum of $27,300 for the said conversion of said bonds, which said proof of claim was in writing, duly verified by the Cashier of said Merced Security Savings Bank and presented to said defendants for allowance and they did on or about February 1st, 1927, reject the said claim and have refused to allow the same or any part thereof or to pay anything thereon; that no part thereof has been paid except the sum of $20,547.02, which was paid by the Fidelity and Deposit Company of Maryland, the corporate surety upon the official bond of said J. B. Hart as City Treasurer, which said sum of $20,547.02 was so paid by said Fidelity and Deposit Company of Maryland to said plaintiff in the above-entitled action on the 23rd day of August, 1927; that there is unpaid upon the value of said securities the sum of $6752.98, no part of which has been paid by said defendants or either of them; that the balance unpaid upon the market value of said securities converted so as aforesaid at the time of said conversion is the sum of $6752.98.

That it is not true that a surety company paid and/or discharged all or any of the obligations of said J. B. Hart as City Treasurer of the City of Merced and of said surety company as his surety as such public officer to said Merced Security Savings Bank and/or to plaintiff herein other than said sum of $20,547.02; that it is not true that said Merced Security Savings Bank and/or said plaintiff has received from any surety company full pay and/or compensation for any and/or all losses sustained by them or either of them by reason of any or all of the

transactions of the said J. B. Hart as such Treasurer or in any manner whatsoever in connection with any and/or all of the bonds mentioned in the complaint filed in said action other than said sum of $20,547.02."

In its memorandum of decision on merits, page 28 transcript, the trial Court stated:

"There can be but one compensation for an injury or tort of the kind that is involved in this suit, which is the market value of the securities converted at the time of conversion, with interest thereon until judgment. The plaintiff has received partial compensation of its loss. It is immaterial from whom any portion of such damage is paid, but any payment on account thereof reduces the liability pro tanto."

The appellant has overlooked entirely the fact that the payments made by the Surety Company to appellant were found by the trial court to have been made on account of the damages sustained by appellant by reason of the conversion of the bonds. As previously shown, the appellant is in no position to attack these findings and this court must presume that the same were supported by the evidence.

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## II.

### NO JUDGMENT SHOULD HAVE BEEN ENTERED IN FAVOR OF THE PLAINTIFF.

We believe the appellant was very fortunate indeed in recovering any judgment in this case. It will be borne in mind that the bonds were deposited with

J. B. Hart, as treasurer of the City of Merced, and as such treasurer he had full authority as far as the bank was concerned, over such bonds. As pointed out by the court in *Campbell v. Manufacturers' National Bank,* 81 Am. St. Rep. 438, 440:

> "The cashier is presumed to have all the authority he exercises in dealing with executive functions legally within the powers of the bank itself, or which are usually or customarily done, or held out to be done, by such an officer. But, the test of the transaction is whether it is with the bank and its business, or with the cashier personally and in his business: *Claflin v. Farmers' Bank,* 25 N. Y. 293; *Moores v. Citizens' Nat. Bank,* 111 U. S. 156. As to the former, all presumptions are in favor of its regularity and binding force. In the latter, no such presumption arises; in fact, upon proof that it was known to the claimant to be an individual transaction, and not one for the bank, the burden is cast upon the claimant to establish by proof that the act of the cashier thus done, for his own individual benefit, was authorized or ratified.
>
> These are fundamental principles applicable to principal and agent in every transaction arising out of that relation: (Citing cases.)"

We believe from the uncontradicted evidence in the case, and the only evidence on the point, that the use of the bank's books in these transactions was simply jugglery by Mr. Hart in appropriating the bonds and the proceeds of the sale thereof to his own use. In the case of *School District of Sedalia v. De Weese,* 110 Fed. 705, which has many points in common with the instant case, the court said:

> "* * * but the evidence shows, beyond question, that, as soon as the proceeds of those different sales were thus passed to the First National Bank of Sedalia, Thompson transferred them to his own individual account. This fact is clearly established by entries in the books of the bank, as also deposit slips and entries made in Thompson's individual pass book, put in evidence, from which the inference is clear that the credit received by the First National Bank for the proceeds was merely a matter of jugglery by Thompson, and passed over at once to the use and benefit of Thompson; and the practical result of the transactions was that Thompson got the benefit thereof, and not the bank."

In that case the court held that Thompson, as cashier and active managing officer of the bank, juggling the books of the bank in a transaction for his own benefit, was not in that transaction the agent of the bank, and his knowledge in that relation did not constitute knowledge of the bank. It will be kept in mind of course in this connection that the only evidence as to who obtained the benefit of the bond transaction in this case was that of W. C. Freeland, and he testified from an accurate examination and audit of the books that the bank gained nothing, and showed by the entries in the books of the bank caused to be made by Mr. Hart, that Mr. Hart covered the $25,000 transfer to appellant bank by juggling the books to show a sale by appellee bank of the bonds, when in fact no sale was made by the bank, and from the testimony of Mr. Freeland which stands alone on the point it appears clearly that Mr. Hart

had appropriated to his own use funds of the City which were covered by these various bond transactions.

We contended, and notwithstanding the memorandum opinion of the learned trial judge, still contend that since the whole transaction was a jugglery of the books of the bank and the use of the name of the bank by J. B. Hart, treasurer of the City of Merced, the bank gained nothing, and in fact had nothing whatsoever to do with the entire transaction, but the entire transaction was personal to J. B. Hart, as treasurer of the City of Merced. We do not make this contention at this time for the purpose of affecting the judgment as rendered by the court, but if our contention in this regard be right, then of course appellant was exceedingly fortunate in having any judgment entered in its favor and was certainly not in any way prejudiced.

In the case just cited the court further says:

> "An officer of a banking corporation has a perfect right to transact his own business at the bank of which he is an officer, and in such a transaction his interest is adverse to the bank, and he represents himself, and not the bank.
>
> It would be a far-reaching and dangerous doctrine to establish, when the cashier of a bank, acting in his individual capacity, and for his own aggrandizement, receives in trust, as the agent of a third party, property or money, that because he is at the time cashier and active manager of the bank and, as a mere matter of bookkeeping (done doubtless, to cover up his own fraud), he first enters the proceeds on the books of the bank

to the bank's credit and immediately passes the same to his own individual account, and forthwith checks the same out to his individual use, the bank should be affected with his guilty knowledge, and made to account for the fruit of his ill-gotten gains, when in point of fact the bank gained nothing in the end by the transaction. The bank in such case is not acting in privity with the agent of the third party. Thompson in these whole transactions was acting as the agent of the bank."

In the case of *Lamson v. Beard,* 94 Fed. 30, 41, the court very aptly characterizes the transactions of Mr. Hart in the case at bar:

"While the transactions appeared upon the books, as stated in the findings, it is a misuse of words, and inconsistent with honest thought, to say that they were known to the bank. Possession of facts, in books purposely kept in a manner to conceal the truth, is not, in law or morals, knowledge of the facts. Cassatt alone had knowledge of the truth, and, though he was president, his knowledge of his own frauds, perpetrated for his individual purposes, was not attributable to the bank."

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## III.

### THE ACTION WAS FULLY COMPROMISED AND SETTLED.

Before this action was commenced J. B. Hart, treasurer of the City of Merced, and manager of appellee bank during the bond transaction under question, died. His wife, Etta Minerva Hart, and

George Eganhoff, were appointed administrators of his estate. The City of Merced brought an action against Fidelity & Deposit Company of Maryland, a corporation, and Etta Minerva Hart and George Eganhoff, administrators of the estate of Hart. The testimony in connection with these transactions appears from the testimony of witness F. W. Henderson, as follows:

> "The Fidelity and Deposit Company of Maryland paid to the City of Merced $11,000.00 in cash and subsequent to that time the Bank of Italy paid to the City of Merced the amount that is mentioned in this letter which includes interest, in all $15,047.02. Those payments were made on account of the suit that you have spoken of here that is referred to and also on account of the suit that the City of Merced brought against the Merced Security Savings Bank and which suit involved the balance of the deposit that had been made by J. B. Hart as Treasurer with the Merced Security Savings Bank. This compromise was devised for the purpose of settling both suits referred to and also suits were brought by Merced Security Savings Bank against the City of Merced which involved the bonds in question.
>
> There were four suits in all."
>
> (Testimony of F. W. Henderson, Trans. of Record, p. 79.)

Thus it will be seen that the estate of J. B. Hart was sued for a recovery of the claims of the appellant here growing out of the bond transaction. A suit was brought by the City of Merced against the predecessor of appellant bank. Two other suits were instituted in connection with the same transaction.

The settlement effected between Fidelity & Deposit Company of Maryland, the official bondsman of J. B. Hart, constituted a compromise of all of those suits and a settlement thereof.

> "Those payments were made on account of the suit that you have spoken of here that is referred to and also on account of the suit that the City of Merced brought against the Merced Security Savings Bank and which suit involved the balance of the deposit that had been made by J. B. Hart as Treasurer with the Merced Security Savings Bank. This compromise was devised for the purpose of settling both suits referred to and also suits were brought by Merced Security Savings Bank against the City of Merced which involved the bonds in question."
>
> (Testimony of F. W. Henderson, Trans. of Record, p. 78.)

Referring to the four cases just adverted to in this brief involving all of these transactions in reference to the bonds, the deposit of city moneys with the appellant bank and the misappropriation of the bonds and of moneys by J. B. Hart, Mr. Henderson testified:

> "All of those transactions that you have referred to (four in number) were dismissed on the consummation of the settlement between the various parties."
>
> (Trans. of Record, p. 80.)

We should state here that the testimony of Mr. Henderson as to the compromise and settlement of those cases was all of the testimony received on that point. The evidence therefore stands uncontradicted that the four suits involving all of these transactions

in which the City of Merced, the predecessor in interest of appellant bank, Fidelity & Deposit Company of Maryland, surety on the official bond of J. B. Hart, and the J. B. Hart estate, were fully compromised and settled between all of the parties upon the payment by the official surety of J. B. Hart, Fidelity & Deposit Company, of the sum credited by the court in the action. The consummation of that settlement is to be found in a letter of Fidelity & Deposit Company to Mr. Louis Ferrari, vice-president of the Bank of Italy, the Bank of Italy being the owner of appellant bank. That letter agreed to pay to appellant bank, appellant bank to pay the amount to the City of Merced, the sum of $15,047.02. Further, the surety company agreed to pay to appellant bank the sum of $5500.00. There was involved in one of the four suits certain warrants aggregating the sum of $3027.62, which by letter it was agreed the Surety Company should protect the city against, and the letter stated with reference to that item that the Surety Company would "pay you one-half of any saving which we may make on the claim of the receiver against the city. It is to be understood, however, that we reserve the right to pay the claim in full, or to make any adjustment we think best."

Thus it appears that the bank by this arrangement was to make one-half of any profit that the Surety Company might avail to itself in defeating the claim of the receiver against the city upon any of those warrants. It will be noticed that this Surety Company, upon the official bond of Mr. Hart recognizing its liability to the city for all of the defalcations in

money and bonds made by Hart, as city treasurer, based its settlement with appellant bank upon the following:

> "We understand you will at once bring suit against the Receiver of the Farmers & Merchants Bank for the value of the bonds misappropriated by that bank, and that in consideration of the payments made to you you will, if successful, pay to us one-half of the net proceeds of that suit after deducting all costs, expenses and attorneys fees. In case either you or we are reimbursed in full for any loss then the other party shall be entitled to the balance of the net proceeds until it is fully reimbursed."
>
> (Trans. of Record, pp. 97 and 98.)

In other words, the Fidelity and Deposit Company of Maryland, as official bondsman for J. B. Hart, as treasurer of the City of Merced, adjusted with appellant bank and the City of Merced all of the claims of the City of Merced against J. B. Hart or against his estate upon payment to appellant bank of the sum of $20,547.02, leaving a net loss to appellant bank of the difference between that amount and $27,300.00, or a net loss of $6752.98.

Notwithstanding the obligation of Hart's surety to reimburse the city for all losses sustained by it by reason of defalcations of Hart it asked the appellant bank to go into court asking for a judgment of $27,300.00 when its loss at that time was only $6752.98; so that the surety company could recover back from appellee the moneys paid out under its bonds for the defalcations of Mr. Hart, after having been instrumental in fully settling and compromising all claims

of the City of Merced and the appellant bank against the estate of the deceased, defaulting city treasurer and bank manager, J. B. Hart. This it would seem would very naturally be obnoxious to man's sense of fairness and certainly would be frowned upon by courts and condemned by the law.

Pursuant to that arrangement, however, this action was instituted. Appellant bank sought to recover for the benefit of the surety company and itself, the entirety of all of its losses after having been reimbursed in the sum of $20,547.02 of that loss by the surety company obligated to pay that loss. It will be kept in mind of course that in consummating this "compromise and settlement" of all of these cases the real wrong-doer, J. B. Hart and his estate, were released from any obligation to reimburse the creditors of appellee bank for the losses sustained by it through Hart's transactions. It would appear upon the face of this sort of transaction that a court of justice would not make itself a party to the consummation sought by the parties to the compromise and settlement.

In the case of *Chetwood v. California Nat. Bank,* 113 Cal. 414, the court said:

> "While the plaintiff may sue one or all of joint tort feasors and while he may maintain separate actions against them, and cause separate judgments to be entered in such actions, he can have but one satisfaction. Once paid for the injury he has suffered, by any one of the joint tort feasors, his right to proceed further against the others is at an end. Where several joint tort feasors have been sued in a single action, a retraxit of the cause of action in favor of one of

them operates to release them all. The reason is quite obvious. By his withdrawal, plaintiff announces that he has received satisfaction for the injury complained of, and it would be unjust that he should be allowed double payment for the single wrong. It matters not, either, whether the payment made was in a large or in a small amount. If it be accepted in satisfaction of the cause of action against the one, it is in law a satisfaction of the claim against them all."

Where a case was dismissed as to one joint tort feasor with an express reservation of the right to proceed against the remaining tort feasors, the court quoted with approval from the case just above cited, and said:

"I think in view of the broad and sweeping language of the supreme court in the case last quoted, it is clear that the release in question, notwithstanding its saving clauses, is a discharge not only of Manson but of his codefendants, Casey and Van der Naillen.

In addition to the authorities referred to in the foregoing opinion, there are a number of cases in other jurisdictions, constituting the weight of authority, which hold that a reservation in a release to one of several tort-feasors does not operate to hold the others. Such a provision, says the court in *Gunther v. Lee*, 45 Md. 60 (24 Am. Rep. 504), 'is simply void as being repugnant to the legal effect and operation of the release itself."

It would seem therefore that the compromise and settlement, and dismissal of the four actions hereinabove mentioned, for the consideration paid by the Fidelity & Deposit Company, surety for J. B. Hart,

one of the tort feasors, if the bank may be held to have had anything to do with the bond transaction, completely satisfied the claim of appellant bank, and its recovery of a judgment for the part of its loss that was not paid by way of settlement with Hart and Hart's estate and the City of Merced, should be a matter of delight to it rather than complaint by it.

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## CONCLUSION.

In conclusion we wish to state that we have carefully examined the cases cited in appellant's brief and find that none of them is applicable either to the facts as shown by the evidence or findings of fact of the trial court.

It is true that there was no privity between the Surety Company and the Farmers and Merchants National Bank of Merced. However, there was privity between the Surety Company and J. B. Hart and the estate of J. B. Hart. As stated in appellant's brief (p. 9) J. B. Hart and the National Bank were joint tort feasors. It was by reason of that privity that the Surety Company paid to the appellant in excess of $20,000.00 on account of the loss sustained by appellant by reason of the conversion of the bonds by Hart.

Dated, Fresno,
October 1, 1930.

Respectfully submitted,
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